

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PATRICK BRADY, et al,

Plaintiff,

-vs-

CIVIL ACTION NUMBER:

02-2917

AIR LINE PILOTS ASSOCIATION,

Defendants.

Mitchell H. Cohen United States Courthouse
One John F. Gerry Plaza
Camden, New Jersey 08101
July 31, 2012

B E F O R E:

THE HONORABLE JOSEPH E. IRENAS
SENIOR UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

ARCHER & GREINER, ESQS.

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JOHN C. CONNELL, ESQUIRE
and

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(Telephoned in)

Certified as True and Correct as required by Title 28, U.S.C.,
Section 753

/S/ Cathy J. Ford, CCR, CRR, RPR

1 THE DEPUTY COURT CLERK: All rise.

2 THE COURT: Good afternoon.

3 MS. RODRIGUEZ: Good afternoon, your Honor.

4 THE COURT: Tell you what a pleasure it is to see all
5 of you. You understand what I just said. I can't tell you
6 what a pleasure it is to see all of you.

7 Everyone, please be seated.

8 Mr. Jacobson, are you here?

9 MR. JACOBSON: Yes, Your Honor.

10 THE COURT: Good afternoon.

11 MR. JACOBSON: Yes, sir.

12 THE COURT: Is it still morning in St. Louis?

13 MR. JACOBSON: No, afternoon.

14 THE COURT: Okay. Mr. Jacobson, can you hear me
15 okay?

16 MR. JACOBSON: It's a little tough, your Honor, but
17 I'm straining to listen.

18 THE COURT: I'm putting a lapel mike on to see if we
19 can -- Mr. Jacobson, how is that?

20 MR. JACOBSON: That's wonderful, your Honor.

21 THE COURT: Of course, this is the matter of Patrick
22 Brady, et al versus Airline Pilots Association International.
23 Can I please have the appearances of counsel.

24 MS. RODRIGUEZ: Good afternoon, your Honor, Lisa
25 Rodriguez from Trujillo, Rodriguez and Richard.

1 MR. PRESS: Allen Press for the plaintiffs.

2 MR. FRAM: Your Honor, good afternoon, Steven Fram
3 Archer Greiner on behalf of ALPA. With me, my partner, John
4 Connell, also from Archer Greiner.

5 THE COURT: There he is. I see him back there.
6 Haven't they put you in a forced retirement, Mr. Connell?

7 MR. CONNELL: Not yet, Judge, it's a little
8 premature.

9 MR. FRAM: Also with us, your Honor, is Daniel Katz,
10 our co-counsel.

11 THE COURT: Okay. There is two matters today,
12 really. One is an application by the defendants in support
13 of -- to certify this case for interlocutory appeal under
14 1292(b). The second, may be called a group of matters, has to
15 do with the procedure that if that motion is not granted --
16 motion is granting, the second, there be nothing else. So if
17 I granted that will stay, obviously, I believe that will stay
18 things that are followed. If the motion is not granted, then
19 how we going to proceed hereafter to move the case to trial.

20 The three questions that the defendant wishes to
21 certify for appeal, for interlocutory appeal, are proof of the
22 old saw. I don't want to control giving the answer. I want
23 to control phrasing the questions. Let me control the
24 question, we won't have to worry about the answer. But, in a
25 generalized sense, I think Mr. Fram might take issue with me,

1 but the argument that all three questions actually put forth
2 is that, in bifurcating the case, I should have required a
3 finding that at least some members of the class would -- had
4 sustained damage as a result of the breach of the union's duty
5 of fair representation. All three of the questions, really,
6 to some degree, raise that same issue in different ways.

7 I took -- and, of course, to some degree, defendant's
8 rights to parse, you know, specific acts of the breach of the
9 duty. Really, was it this act, was it failure to take an
10 appeal, failure to file a suit, failure to do this, failure to
11 do that. There was no finding of any particular failure. I
12 took the position, for right or for wrong, that the heart of
13 the plaintiff's case was that the union breached its duty of
14 fair representation because it was curried, this is lay talk,
15 but curried in favor with APA who represented the American
16 Airline Pilots. And in doing so it breached its duty of
17 loyalty to the pilots it represented which was the TWA pilots.
18 And I did not require any finding by the jury that a
19 particular different negative result would have occurred had
20 the ALPA been loyal to its TWA union members. All three
21 questions basically raise the same issue in one way or
22 another.

23 So, I'm going to turn it over to Mr. Fram, whoever is
24 going to argue it.

25 MR. FRAM: With the Court's permission, Mr. Katz will

1 argue it.

2 THE COURT: Either way, whoever wants to. Or you
3 both can take part if you want. I'll even let Mr. Connell say
4 something if he wants to.

5 MR. KATZ: Thank you, your Honor.

6 THE COURT: I have to have humor while you're here,
7 come on.

8 MR. KATZ: With all respect, your Honor --

9 THE COURT: Don't say that. That's the last time
10 today, anybody in this courtroom is going to say "with all due
11 respect." Because, to me, when somebody tells you "with all
12 due respect," it means, I'll give you what you're due, which
13 is nothing, because you got it wrong so.

14 MR. KATZ: The insights that you've given us about
15 the issues that ALPA has posed in its brief in support of the
16 1292(b) application, I think --

17 THE COURT: I'm looking at the three questions. You
18 laid them out on page one and two.

19 MR. KATZ: Exactly. We tried to be helpful.

20 THE COURT: And you were.

21 MR. KATZ: I think to some extent we captured one of
22 the concerns that ALPA has with the law as applied in this
23 case. But I think that also underlying the other questions
24 are separate sub-issues. One can say that one issue that
25 covers all of them is what is the correct duty of fair

1 representation standard to be applied in this case. That
2 would be one way of phrasing it.

3 The Supreme Court has said there are three elements
4 to -- that are separate in applying the duty of fair
5 representation --

6 THE COURT: Assume I know this.

7 MR. KATZ: -- whether arbitrary, discriminatory and
8 bad faith. And the discriminatory standard is out of the
9 case.

10 And one of the sub-issues is what is the proper
11 application of the arbitrary standards --

12 THE COURT: Do you agree with me, though, that if --
13 here, you have a case of one union, in a sense, negotiating
14 with another union for the seniority integration, okay. It's
15 not as simple as that, I understand. There was the waiver
16 that the union did early on so it gets a little complicated.
17 But, fundamentally, you had the American pilots who would
18 benefit from, let's say, the worse possible integration,
19 stapling. And that would be American's pilots best result.
20 And the TWA pilots who would benefit -- if there was total
21 integration. You just took the two lists and matched them
22 right to the date of hire on one list, right? That would be
23 the best result for the TWA pilots, right?

24 MR. KATZ: The best result for the TWA --

25 THE COURT: Theoretically.

1 MR. KATZ: Theoretically, the best result --

2 THE COURT: One list from the American, which is, in
3 fact, what in the TWA contract that ALPA provided, I believe.

4 MR. KATZ: The contract provided for negotiations and
5 arbitration by a neutral third-party to settle the integration
6 issue.

7 THE COURT: Yeah, but I think it was more than that.
8 I think there was some background that suggested what they
9 wanted was this complete integration as you can have.

10 MR. KATZ: The TWA pilots were seeking a variant of a
11 date of hire of integration. They didn't --

12 THE COURT: The American pilots, their contract, I
13 believe provided for stapling.

14 MR. KATZ: Yes.

15 THE COURT: I think that was actually so.

16 MR. KATZ: In their contract --

17 THE COURT: So, you have two unions and two groups of
18 pilots who have some very contrary issues created by this
19 merger. In that case, ALPA had a -- it was very important for
20 ALPA -- remember, these negotiations are very, very subtle.
21 And they are tri-partite because you have to negotiate with
22 American, to some degree; you have those negotiations going
23 on, and you have the negotiation between the unions. It's
24 very, very important that ALPA's heart beats for the TWA
25 pilots. It wants that it has unfettered duty of loyalty to

1 them and will do, when it makes a decision, whether right or
2 wrong, it's making a decision in the profound belief that it's
3 the best thing for its pilots, the TWA pilots.

4 Much like a lawyer. You know, we have conflict of
5 interest rules 1.7. You want your lawyer to be loyal to you.
6 The client wants to feel that you're -- not only that you're
7 right, but whether you're right or wrong in a particular
8 decision, your motivation is for the client.

9 And I put out to the jury, and the theory of the case
10 tried by the plaintiffs, was that ALPA was about to lose the
11 shrinking pilot base of TWA, shrinking airline at that point.
12 They were about to lose those pilots no matter what happened.
13 And they wanted APA to -- well, they wanted American to come
14 into ALPA, to leave APA and come into ALPA. If that's
15 American's motivation in carrying out its negotiations -- and
16 that comes to the notion of fair representation. You can use
17 all the fancy words you want, all the tests you want, if ALPA
18 is motivated by a desire not to help ALPA but to bring the
19 newly merged airline pilots of whom a number was huge, 10,000
20 pilots something, total, if you add TWA to American --

21 MR. KATZ: 11,500 American pilots --

22 THE COURT: One thing about Mr. Katz, he'll know the
23 numbers.

24 MR. KATZ: 2,300 TWA pilots.

25 THE COURT: He'll know the numbers, he'll know what

1 sock sizes they wear. If that's the case -- and I think the
2 jury found that case, that was the case presented to the jury,
3 it's really a very bad thing.

4 For instance, you phrase your first question, Where
5 union members charged that a union acted arbitrarily toward a
6 union of representative employees -- forget acted arbitrarily.
7 Acted without your best interest at heart -- can that union be
8 held to have acted arbitrarily when its advice and decisions
9 were all supported by a substantial segment of the represented
10 group and were objectively reasonable.

11 Well, the answer to that: Based on the facts and the
12 law known at the time.

13 You want me to say the answer is obviously no. I say
14 the answer is obviously yes.

15 MR. KATZ: Your Honor, I'm not asking you to say the
16 answer is no. I'm suggesting that there is a debatable
17 proposition. The arbitrary led a duty of fair representation
18 standard --

19 THE COURT: But that's analyzing fact. In fact, you
20 use the word, Based on the facts and the law.

21 MR. KATZ: Your Honor, it is a legal issue --

22 THE COURT: It's not a legal issue. It's a factual
23 issue.

24 MR. KATZ: The legal issue is what is the proper
25 standard for an arbitrary DFR violation. And it's an

1 objective standard. It doesn't not --

2 THE COURT: You throw the word "arbitrary" in. You
3 throw that word in.

4 MR. KATZ: That's one of the three bases of the DFR
5 violation.

6 THE COURT: You don't want to say -- I am absolutely
7 convinced if this case goes to the Supreme Court, they're
8 going to say, I don't know whether it falls into the arbitrary
9 or what word it falls within, if a union is motivated, not to
10 support its members, but to, not to offend and to, in fact,
11 recruit the other party in the negotiation, the other pilot's
12 union, that that's a breach of duty of fair representation.
13 In fact, I think the Third Circuit actually said that in its
14 opinion when it sent the case back to me. I believe that was
15 said right in that opinion.

16 MR. KATZ: Your Honor, I've been practicing labor law
17 for 43 years --

18 THE COURT: I've practiced it for no years.

19 MR. KATZ: And I would submit to you that there is a
20 proposition here that the Third Circuit may well diverge the
21 law as this Court has applied it to this case in terms of the
22 arbitrary standard for the duty of fair representation
23 violation or for the bad faith that led to the duty of fair
24 representation or for the causation led. Those are separate
25 elements of establishing and proving a duty of fair

1 representation violation. It is not any different from what
2 the Third Circuit has said. The plaintiffs quoted -- they
3 actually misquoted on page seven of the plaintiff's opposition
4 brief. They talked about this conflict of interest that you
5 asserted and --

6 THE COURT: Let me get that, page seven?

7 MR. KATZ: Yes. ALPA disagrees that there is any
8 conflict of interest here.

9 THE COURT: Well, of course.

10 MR. KATZ: It would have been the best thing that
11 could have happened to the TWA pilots if the American pilots
12 had decided to join ALPA and come under ALPA's merger policy
13 which would have required them to arbitrate the integrating of
14 seniority pilots with the TWA pilots, but they weren't going
15 to come in and -- accepting for the sake of argument, this
16 conflict of interest --

17 THE COURT: But that even there, you are kind of
18 turning the facts a little on their head, but what APA wanted,
19 and maybe even ALPA, was to resolve that dispute between -- in
20 other words, fix the integration, reach an agreement on the
21 integration and then bring in the APA. So whatever the --
22 when I say that, you know, bring the pilots into ALPA from the
23 APA. Well, at that point the integration would have been done
24 and whatever ALPA's policy on integration is would have made
25 no difference.

1 MR. KATZ: Judge Irenas on the bottom of page seven
2 is a portion of the Third Circuit decision you referred to.
3 It talks about is ALPA facing the conflict of interest arising
4 from an active organizing campaign to bring American pilots
5 into ALPA with the knowledge and approval of ALPA. It says
6 ALPA, but what the Third Circuit said was with the knowledge
7 and approval of the Allied Pilots Association, of APA. And
8 there was no evidence at trial because it wasn't true that
9 there was any active organizing campaign to bring American
10 pilots into ALPA. It was also untrue --

11 THE COURT: You just can't say there is no evidence.

12 MR. KATZ: There is no evidence.

13 THE COURT: I already ruled on it. There is
14 evidence. All right.

15 MR. KATZ: You referred in denying our Rule 50(b)
16 motion to events that occurred in December 2001. The events
17 that plaintiffs are challenging occurred March and April and
18 throughout 2001 up until November 7th, 2001 when Supplement CC
19 was signed.

20 But look at the reminder of this quote that they got at
21 the bottom of page seven.

22 THE COURT: Are you saying it was misquoted?

23 MR. KATZ: Well, it says ALPA in the fourth line. It
24 should say APA. And then it says, it is premature to dismiss
25 the DFR claims if plaintiff proves their allegations that ALPA

1 failed to take specific actions on behalf of its members or
2 improper purpose or in bad faith. And there is no trial
3 evidence that ALPA failed to take any specific action for
4 improper purpose.

5 THE COURT: There wasn't any testimony that there are
6 certain things that they should have done? Then maybe we
7 weren't watching the same trial.

8 MR. KATZ: Well, the trial I saw Mike Day testified
9 that he asked Duane Woerth to start a jump seat war in
10 April 2001.

11 THE COURT: Even before that.

12 MR. KATZ: Well, let's talk about the April 2nd MEC.
13 The word "advising." Were advising MEC on April 2nd, 2001.
14 Randy Babbitt, who was the administrator of the FAA after
15 having been appointed by the President, confirmed by the
16 Senate, he advised the MEC. There is absolutely no evidence
17 in the trial record that Randy Babbitt was basing his advice
18 on an improper purpose or in bad faith.

19 Richard Seltzer, you heard him testify, a lawyer from
20 Cohen, Weiss and Simon, a bankruptcy expert, who testified
21 about what he said at the April 2nd meeting. There is no
22 evidence whatsoever that either Babbitt or Seltzer or Michael
23 Glazer, the investment banker, were even aware of this
24 supposed effort, active organized campaign by ALPA. There was
25 no organized campaign by anyone on April 2nd, 2001, your

1 Honor. The Honey Bell and Clark campaign began in May, so how
2 could Babbitt or Seltzer or Glazer be aware of it.

3 There are a lot of facts in this case, I readily admit
4 that. But the fact --

5 THE COURT: That's a profound statement.

6 MR. KATZ: That doesn't mean the issues we raise are
7 not legal issues. It means that there is a record of a
8 five-week trial that supports the legal questions that we
9 respectfully submit are debatable. We are not saying that you
10 should admit that they're wrong. There is no question, there
11 are admitting District Judges who have certified cases after
12 being convinced that they were right about the ruling they
13 made, but they recognize that they were difficult issues and
14 this conflict of interest issue that the plaintiffs have
15 argued and this Court has accepted presents and raises a
16 debatable issue. Can that supposed conflict of interest
17 substitute the kind of evidence the Third Circuit was talking
18 about right here.

19 The Third Circuit said we want specific actions, we
20 want proof of an improper purpose or bad faith. They knew
21 about the conflict of interest that's referred to in the same
22 quotation, but the Court of Appeals, which was reviewing the
23 statute of limitations issue at that time says --

24 THE COURT: The ray of hope doctrine.

25 MR. KATZ: The ray of hope doctrine. I think the

1 Court once referred to it as the glimmer of hope doctrine.
2 However, that may be, we think you were correct in dismissing
3 the case before, and we think that you should provide an
4 opportunity now for the Third Circuit to give us its --

5 THE COURT: To say I was right.

6 MR. KATZ: The Third Circuit's view of its divergent
7 it's better for all of us to find out now. That divergent
8 from law as applied last year to the trial that we conducted
9 in June and July of last year. It will save the Court time.
10 It will save the party's time and money. It will be much more
11 efficient to get the answer to the question of, What is the
12 proper DFR standard to be applied to this case from the Third
13 Circuit at this point in time?

14 And while the Court mentioned the stay, we have
15 suggested in our 1292(b) brief, there is no automatic stay
16 just because you approve the application by one party to
17 request interlocutory Appellate review. And these proceedings
18 in the District Court could go on with plaintiffs initially
19 preparing their expert report --

20 THE COURT: But you would ask for a stay?

21 MR. KATZ: I'm not suggesting that we would. I don't
22 think ALPA has made that determination. And if the Court --
23 it's within the Court's discretion as to whether to grant the
24 stay or not. We can have parallel proceedings where the
25 damages of proceedings continue in this court and there is no

1 loss of time if we can apply to the Third Circuit and grant
2 review, each side files a brief, maybe there is argument, and
3 they render a decision, it would be prior to the time that we
4 would be completed, completing discovery and going into the
5 final pretrial preparations and the trial on damages. So it
6 would advance the ultimate resolution of the case, calls for
7 an immediate appeal. The issue we raised, our legal issues,
8 are not factual ones. The question of whether this conflict
9 of interest is a substitute for evidence of bad faith
10 motivation for Mr. Babbitt or Mr. Seltzer or Mr. Glazer to
11 change his advice, whether it's a substitute for evidence that
12 made a difference to the MEC and whether that caused any harm
13 to the jobs of the TWA pilots, the advice that was rendered,
14 those are all legal questions. It's not necessary for the
15 Court of Appeals to delve into a factual question, is this
16 witness right, or is this witness right? The evidence is
17 there in the trial record. The Court suggested two years ago
18 when we were here on prior application under Section 1292(b)
19 that it would be appropriate to await the completion of the
20 trial so that there would be a complete record of these events
21 for the Appellate Court to review. We have accomplished that.
22 The trial was conducted over five weeks and that record is
23 completed.

24 So, it is an appropriate moment for the Appellate Court
25 review that we are seeking. I guess I would just refer the

1 Court in terms of the arbitrary standard we are talking for
2 are pages 15 to 20 of our 1292(b) brief.

3 THE COURT: I'm sorry, what page are you referring
4 to?

5 MR. KATZ: 15 to 20.

6 THE COURT: Page 15?

7 MR. KATZ: 15 to 20 of our 1292(b) brief.

8 THE COURT: Reply brief or the original belief.

9 MR. KATZ: The original brief. We discussed the
10 Supreme Court case and cases from six circuit Courts of
11 Appeals that talk about the causation requirement as framed in
12 our third issue. And those cases differ substantially because
13 they require direct evidence that the alleged misconduct by
14 the union, that it be seriousness, that it cause a worse
15 seniority integration than would otherwise have happened --

16 THE COURT: Or in unified trial, I wouldn't disagree
17 with you. I would agree with that. Obviously, even
18 comparable law thinks, you know, it's better -- a lawyer, you
19 know, commits a breach of his duty of fair representation, in
20 one way or another, at the end of the day, you have to also
21 prove that the client was damaged by it. And I don't think
22 it's any different here. It's just that we bifurcated it.

23 I don't disagree with that at all, showing a breach of
24 duty of fair representation without damage. There is no cause
25 of action. I don't disagree with that. I don't think the

1 plaintiffs would disagree with that. I don't know how they
2 could. They're not in this for a \$1 verdict.

3 MR. KATZ: The plaintiffs did argue to the jury that
4 if one TWA pilot would have been moved one place higher on the
5 merged list as a result of ALPA's alleged misconduct, that
6 that satisfies the causation requirement. It was a separate
7 requirement in the verdict form. So, I think the plaintiffs
8 do contend that they fulfilled that element of the duty of
9 fair representation because the jury checked off the box
10 saying that some of the TWA pilots were injured by ALPA's
11 alleged misdeeds, but that's not the kind of injury that is of
12 the legal matter.

13 The Circuit Courts of Appeals and The United States
14 Supreme Court as required in these cases that we cited and
15 referenced as part of our brief, in terms of the bad faith
16 claim, the plaintiffs are saying that there are reasonable
17 inferences that can be drawn to support the jury's verdict.
18 In our view, those inferences do not amount to substantial
19 evidence of fraud, deceitful action, or dishonest conduct.
20 That's a very high standard.

21 I can refer the Court to one decision that explicates
22 the high standards that are required here. It's the O'Neill
23 versus ALPA case in the Fifth Circuit after it was remanded by
24 the United States Supreme Court, that Fifth Circuit decision
25 addresses the bad faith requirement and explains the very high

1 standard that is required to establish bad faith. Inferences
2 from supposed conflict of interest do not satisfy that
3 substantial evidence of fraud, deceitful action, or dishonest
4 conduct. What was the fraud, deceitful action, or dishonest
5 conduct? As this Court had previously recognized, everybody
6 knew from October of 2000 -- and even before then -- that it
7 was ALPA's goal to organize all of the unorganized pilots and
8 all the pilots in independent pilots unions. There was
9 nothing wrong with that goal. The TWA, MEC members concurred
10 in that goal when there was a resolution adopted at the
11 October 2004 director's meeting. That's not made in defraud,
12 because American and TWA corporations agree on a corporate
13 transaction for the assets of TWA to be acquired by American
14 Airlines. That doesn't turn something that was totally
15 proper, organized, into unorganized, into something that is
16 fraudulent, or deceitful or dishonest. There is nothing that
17 amounted to anything like that. And the O'Neill case in the
18 Fifth Circuit is one we would point the Third Circuit to, to
19 contrast with the law that was applied here where the
20 plaintiffs rely on inferences and circumstantial evidence such
21 as a meeting between John Clark and Duane Woerth that occurred
22 on December 6th, 2001.

23 THE COURT: In Las Vegas.

24 MR. KATZ: In Las Vegas, exactly. This is a month
25 after Supplement CC has already been entered into.

1 And let me just pose a hypothetical to Judge Irenas.
2 Suppose Duane Woerth had refused the meeting or had gone to
3 the meeting and when Clark offered some organization cards,
4 said, We don't want your organization cards. The plaintiffs
5 will be claiming that was a duty of fair representation
6 violation. In fact, Jerry Cure, the lawyer for plaintiffs,
7 and the allegations in the second amended restated complaint
8 that ALPA didn't do enough to bring the American pilots into
9 ALPA. And it was a violation of the duty of fair
10 representation for ALPA not to have sought to have an election
11 conducted by the National Mediation Board. And that's one of
12 the things that those cards might have been useful for, under
13 some circumstance. So, the bottom line on that is that there
14 is a very different legal standard that the plaintiffs are
15 applying and that the Court is accepting to talk about
16 inferences which we view as not reasonable inferences because
17 they don't satisfy the long-well established Humphrey versus
18 Moore substantial evidence of fraud, deceitful action, or
19 dishonest conduct rule that has been applied by many Courts of
20 Appeals including the Fifth Circuit in the case I mentioned.

21 The arbitrary claim falls on its own weight if there is
22 no bad faith. The arbitrary standard has been repeatedly
23 referred to by the Supreme Court as an objective standard. It
24 doesn't have to do with the intent of the union or the union
25 officials. It's got to do with whether there was a wholly

1 irrational decision made by the union. And we submit, while
2 there are many facts at issue in this case, that the
3 undisputed facts that were adduced at trial show that every
4 decision ALPA made was reasonable, was, at least, it was to
5 use a double negative, it was not wholly irrational which is
6 the standard imposed by the Supreme Court.

7 Take the decision about a jump-seat war, and I come
8 back to that because the Court had previously recognized in
9 some earlier hearing that there was a possibility of
10 retaliation by the American pilots and that it would lead to a
11 worse seniority integration and it would only lead to
12 disruption of the industry if ALPA were to undertake a
13 jump-seat boycott. How can one say that was wholly irrational
14 for Duane Woerth to have told Mike Day, We have a policy
15 against that. We don't use jump-seats for political purposes.
16 And this is not anything that's going to help you. So, he
17 said, No. When it's based on the policy as understood by the
18 president of the union, we submit, with all respect, that
19 cannot be wholly irrational. And the arbitrary standard as
20 interpreted by other Courts of Appeals and by the Third
21 Circuit would take a different read on that regardless of the
22 allegation of a conflict of interest in the case.

23 So, unless there are further questions, or comments, I
24 thank you for your attention.

25 THE COURT: Thank you very much.

1 Who is going to -- Mr. Press, you're going to do it?

2 MR. PRESS: Thank you, your Honor.

3 All three of the issues that they seek for you to
4 certify basically argue at their core that plaintiffs for one
5 of three reasons, or all three reasons, that plaintiffs did
6 not make a submissible case, that's what they're all about on
7 their efforts. And for the Third Circuit to answer either one
8 of those questions, or all three of them, will require the
9 Third Circuit to review the entire record.

10 Now, if this is a case that is completely inappropriate
11 for a certification at this juncture, this is it. All three
12 questions are phrased in an argumentative way and
13 mischaracterizes the evidence and argue. All three questions
14 are factually offensive. And, Judge, for that reason the
15 motion should be denied.

16 And the second prong of the statutory analysis wasn't
17 discussed by Mr. Katz and that's the issue of whether or not
18 this is going to materially advance litigation, the outcome of
19 litigation, that is. It clearly argued to certify these
20 issues now for appeal would only further protract this
21 litigation, Judge. It will not materially advance it. The
22 Third Circuit took almost two years to decide the original
23 appeal which was a pure legal question. And so the notion
24 that we could receive what the damage phase in the Third
25 Circuit won't rule yet before we get to the damages jury, that

1 verdict, that's preposterous, Judge.

2 We urge you to deny this motion. And unless you have a
3 question of me, I'm going to sit down, Judge.

4 THE COURT: Okay. Mr. Katz, anything you want to
5 add?

6 MR. KATZ: Nothing further, your Honor.

7 THE COURT: All right. When was this case filed
8 originally?

9 MR. PRESS: September 2002.

10 THE COURT: 2000 --

11 MR. PRESS: Two.

12 THE COURT: So, we're sitting here with a ten-year
13 old case.

14 MR. PRESS: True.

15 THE COURT: The first prong of the 1292(b) analysis,
16 of course, is the Court must find that the order presents a
17 controlling question of law which if wrongfully decided would
18 result in reversible error. The caselaw makes clear that when
19 we talk about a controlling rule of law, they're not talking
20 about, in effect, mixed questions of fact of law, they're
21 talking about a rule where it does not require detailed
22 factual analysis. But just where there may be a reasonable
23 difference of opinion as to what rule of law should apply.
24 Now, look at the questions: Where union members charge that a
25 union acted arbitrarily towards a union of represented

1 employees, can that union be held to have acted arbitrarily
2 when its advice or decision were all supported by a
3 substantial segment of the represented group and were
4 objectively reasonably based on the facts -- based on the
5 facts -- and the law. In my view, that is an intentionally
6 factual question. You have to decide does a substantial
7 segment support any particular decision? Was it objectively
8 reasonable? I mean, was it objectively reasonable in a
9 particular situation not to seek an adjournment of a court
10 proceeding? What kind of analysis is that? That's hardly a
11 legal analysis. To me, if a union is operating under a very
12 square conflict of interest where their loyalty is not to the
13 people they represent, but to employees of a different union,
14 even the fact that a particular decision might be -- might
15 find support as being objectively reasonable, might find that
16 it was supported by a substantial segment of a represented
17 group, still doesn't mean that it was the right decision and
18 doesn't mean that it couldn't be effected, if you will, by the
19 breach of the duty of loyalty. And the second and third
20 also -- the second question is, Where a union has an alleged
21 conflict of interest based on its essential purpose to
22 organize employee groups, can that union be held to have acted
23 in bad faith in the absence of direct evidence that the union
24 altered its advice or decisions in a way that involved
25 intentional misrepresentations or dishonest conduct. That, to

1 me, and once again, a detailed factual analysis. And I'm not
2 going to read the third one because it's longer. But I think
3 all three of these are not the kind of each square issue of
4 law. Like the issue that sent the case back to us in the
5 first place. Although, it wasn't interlocutory. I think all
6 answers to all of these three questions, by the very nature,
7 involve a very detailed factual analysis of the record.

8 And to another degree, in effect, the questions were
9 framed -- that's why I say if you control the question, not
10 the answer, you're probably better off. The questions here
11 are framed in a way to try to make them look like legal
12 issues, but they're not. They might come down to a mixed
13 issue of fact of law to some degree, but I believe that when
14 the issue of a breach of the duty of loyalty is concerned,
15 there is no issue that, in my view, they're trying to use --
16 the defendants are trying to frame the question in a way to
17 make a breach of the duty of loyalty, not a breach of the duty
18 of fair representation, unless there are things like dishonest
19 conduct, intentional misrepresentation. I don't think that's
20 the case. I think, in and of itself, a union which is
21 motivated by a loyalty to a group with whom its own members
22 are negotiating, has breached the duty of fair representation.
23 Again, I think at the end of the day there has to be damages.
24 But even in this case, our jury decided that if that duty of
25 loyalty hadn't been breached, at least some of the pilots

1 would have done better in their negotiations for integration
2 with American pilots.

3 I really don't have to do the second three, but the
4 second is that the order offers a substantial ground for
5 difference of opinion as to its correctness. I don't accept
6 that. I don't accept that there is a reasonable ground for
7 difference.

8 And, finally, if the appeal immediately will materially
9 advance the ultimate determination of the litigation. I don't
10 believe that. I don't believe that for a minute. It's a
11 ten-year old litigation, another two years at the circuit
12 isn't going to help this litigation. And we're better off
13 pushing it to a conclusion and letting the circuit have a
14 whole record and dealing with it.

15 I'm going to deny the motion for a Section 1292(b)
16 certification and proceed to bring this case to a conclusion.

17 Now, having ruled against the defendants on that issue,
18 the plaintiffs, you got a difficult road to hoe. I think
19 we're all ready, are we not, past the date for the expert
20 reports?

21 MS. RODRIGUEZ: No, Your Honor. The original date
22 was August 6th.

23 THE COURT: For the file -- but you're not going to
24 meet that date?

25 MS. RODRIGUEZ: We're not going to meet that date.

1 THE COURT: Well, you know, this case is very old.
2 The theory of the case, meaning the theory that you argued,
3 and that the jury adopted, meaning the breach of the duty of
4 exclusive loyalty to the TWA pilots. You've known that theory
5 now for years and years and years. It's not like it was like
6 the theory changed at the last minute and then you suddenly
7 were faced with a new theory of liability. You got to come
8 forth with your expert. You have to show me, and the other
9 side, as to how you're going to prove your case.

10 MS. RODRIGUEZ: And we're working on it.

11 THE COURT: Because I'm sitting here now, and I can't
12 figure it out.

13 MS. RODRIGUEZ: Your Honor, we're working on that.

14 THE COURT: Well, I know "we're working on it."

15 MS. RODRIGUEZ: As your Honor knows discovery on the
16 damage phase was stayed until May 4th. So, actually --

17 THE COURT: But that -- maybe you need some
18 discovery, I'm not saying there isn't some discovery, but the
19 simple matter is you know what the theory is.

20 MS. RODRIGUEZ: We know what the theory is.

21 THE COURT: And you know a lot of the facts.

22 MS. RODRIGUEZ: We do.

23 THE COURT: I'm not saying there isn't maybe a nook
24 or cranny in discovery that's needed, but, I mean, this case
25 has been well explored by both sides.

1 MS. RODRIGUEZ: Your Honor, our experts are in the
2 process of putting together a "but for" seniority list. "But
3 for" the breach of ALPA, this is what a reasonable --

4 THE COURT: And, by the way, Vulcan doesn't -- Vulcan
5 One or Two, I'm not totally persuaded by Vulcan. Vulcan is a
6 nonjury case, I believe.

7 MS. RODRIGUEZ: It was a nonjury case.

8 THE COURT: It was a nonjury case. Because a jury
9 case which alone, as Mr. Fram pointed out in one of his
10 papers, makes a big difference.

11 MR. FRAM: It was a Title Seven case, your Honor.

12 THE COURT: And the Supreme Court, I think, has since
13 said that the theory they used is not only limited to Title
14 Seven cases but limited to even a subspecies of Title Seven
15 cases, I believe.

16 MS. RODRIGUEZ: I think what the takeaway from Vulcan
17 and Duke is that -- at least as to the mitigation part of the
18 case -- that has to be presented. That the defendants have to
19 have a chance to test mitigation separately, that's why we
20 proposed a --

21 THE COURT: Yeah, but where do -- you seem to suggest
22 that I take away from the jury, for instance, the mitigation
23 issue. How can I do that? How can I take it away from the
24 jury?

25 MS. RODRIGUEZ: Perhaps, you don't take it away from

1 the jury, but in the first instance, you have to have the "but
2 for" list. And the defendants have been talking all along
3 that they don't know who damaged, who is high, who is low, and
4 once you have that list, you will know who has been damaged
5 and who hasn't been damaged, because there will be people at
6 the top of the list that were reasonably integrated and there
7 will be people at the bottom of the list that would have been
8 furloughed regardless. So, you'll have those people on either
9 end of the list --

10 THE COURT: You mean, you'll concede that point, is
11 what you're saying?

12 MS. RODRIGUEZ: And we've always conceded that point.

13 THE COURT: There are some people in the, quote,
14 class who there won't be a damage claim.

15 MS. RODRIGUEZ: Because they're either too low or
16 they were high enough that they were integrated in a
17 reasonable fashion. So, you'll have that list and then
18 they'll know who the damaged members of the class are.

19 So, that's step one.

20 THE COURT: Well, when is step one -- since we can't
21 go to step two without step one, when is step one going to be
22 completed?

23 MR. PRESS: Judge, we deferred this so that I could
24 report back to you on the status of American Airlines document
25 production to us which is crucial for our damage model in that

1 when we reassigned TWA pilot with a new seniority number, we
2 are going to use the actual earning of the person in that
3 seniority slot for our assumed earnings for that pilot. It's
4 the best data there is for that.

5 We are trying to eliminate as many assumptions from our
6 model as possible so that we have less quarreling with the
7 other side.

8 I spoke with the lawyer yesterday. He said --

9 THE COURT: The lawyer?

10 MR. PRESS: The American Airlines lawyer yesterday.
11 He told me we should have the data this week in an electronic
12 format that our expert is going to be able to use.

13 Our experts have told us that if that happens, we --

14 THE COURT: This is the bankruptcy lawyer?

15 MR. PRESS: It's their general counsel in Washington
16 D.C.

17 MR. KATZ: Your Honor, if I may, I got an e-mail from
18 the lawyer. The name is Jonathan Fritts, F-R-I-T-T-S. He's a
19 partner with Morgan, Lewis and Bockius in Washington, D.C. or
20 labor counsel for American Airlines, and have been back in
21 2001. And what he said in the e-mail was that he talked to
22 Allen and that American was prepared to produce this week some
23 of the data that had been requested by the plaintiffs and by
24 ALPA, because we've subpoenaed American to produce information
25 as well. But as other information, including the wage

1 information, the W2 earnings for the individual pilots, he did
2 not give any anticipated time of arrival to that data.

3 THE COURT: You sound like a baby.

4 MR. PRESS: But the data that they are going to
5 provide this week is sufficient for us. Our purpose is to get
6 a good start and get our experts going. And, Judge, they have
7 assured us that they can have reports by the end of September.
8 So that's what we're here to report to you today.

9 MR. FRAM: Your Honor, if I can ask for a
10 clarification --

11 THE COURT: Ask it from me?

12 MR. FRAM: From plaintiff's counsel.

13 The outstanding directive requires all the plaintiffs
14 expert reports with respect to damages, and I think what
15 counsel commented is that they're going to have a "but for"
16 list, I just want to be clear that the reports we get at
17 whatever date are all of their reports. But for damages, the
18 whole kit and caboodle so that we know what we're looking at.

19 THE COURT: Well, the one thing that won't happen, of
20 course, is mitigation. They're not going to prove mitigation
21 for you.

22 MR. PRESS: That was not our intent.

23 MR. FRAM: That I appreciate, but in terms of --

24 MR. PRESS: By the way, can I interrupt. Failure to
25 mitigate has not been pleaded, it's not an issue that's framed

1 in the pleadings in this case. So I just wanted to alert the
2 Court to that.

3 MR. FRAM: Your Honor, we'll move to amend if there
4 is any question about it. We raised that repeatedly. Of
5 course, the case was bifurcated. We were focusing on
6 liability issues. I don't think anybody even thought about
7 the issue of mitigation. In fact, the facts that pertain to
8 mitigation, or the lack thereof, didn't even exist at the time
9 the case was commenced.

10 So, if we need a formal motion, we'll certainly make it
11 on appeal.

12 THE COURT: I'm not going to advise that. You have
13 to make your own decision on that.

14 MR. FRAM: But we're not asking for the plaintiff to
15 prove mitigation for us, your Honor. What we're asking to
16 do is to produce --

17 THE COURT: Clearly, that would be your burden. If
18 you wanted to challenge on the mitigation basis, that's your
19 burden.

20 MR. FRAM: We'll, of course, need information from
21 the class to get into that issue. So we will need some
22 discovery. But my point is that I just want to be clear from
23 the plaintiff's perspective, your Honor, that whatever expert
24 reports they intend to rely upon will be provided by whatever
25 date the Court sets. And that we're not going to have a

1 multi-step process, which I think is what counsel may have
2 been suggesting. We're going to get a "but for" list by a
3 certain date and then on some other date in the future, we're
4 going to get actual calculation and numbers.

5 So, I would appreciate the clarification on what
6 we're going to get by whatever date the Court sets.

7 MR. PRESS: It was our intent to provide by
8 September 30th the re-created seniority list with the "what
9 if" earnings if each TWA pilots had been in that spot.
10 Those --

11 THE COURT: You have the data for that?

12 MR. PRESS: Yes. Assuming --

13 THE COURT: He's suggesting you won't.

14 MR. PRESS: Assuming the American Airlines lawyer is
15 not misleading us or is mistaken himself, we will have that
16 data.

17 THE COURT: Including W2s.

18 MR. PRESS: No -- yes.

19 THE COURT: From the American?

20 MR. PRESS: From the American pilots. What we won't
21 have is the information to apply a setoff for the class
22 members interim earnings. We will not have that data by
23 September 30th, but we will have the first two components of
24 the damage model which are the two most critical for the
25 defendant to be able to analyze and see what our case is

1 about.

2 MR. FRAM: Your Honor, the interim earnings is not a
3 question of litigation that's something plaintiffs have to
4 account for in their damages calculations. And we were
5 anticipating they would have that information.

6 So, it does sound to me like --

7 THE COURT: That information is in your control?
8 That's your client's base, isn't it?

9 MR. PRESS: Judge, we would have to send notice to
10 the class members. First, we have to identify the damaged
11 class members, who are they? Who should be giving us their
12 W2s and tax returns. We won't have that until the end of
13 September. So, we would suggest, we will disclose the "what
14 if" seniority list, the "what if" earnings, that gives them --
15 that's where the battle is, that's where the attack is. When
16 we re-create the seniority list, that's where they're going to
17 jump up and down say, it's ridiculous.

18 THE COURT: Maybe they'll agree with you.

19 MR. PRESS: It could happen. I would welcome that.
20 But for us to then supplemental the report, to just simply
21 report what the damaged class members earned in the interim
22 period, that's not going to be something I hope that there is
23 a lot of debate about. It's a matter of just summarizing tax
24 returns and subtracting from the "what if" earnings to the
25 actual interim earnings and coming to a net number. That's

1 simple. That's math. So, we would suggest that we have that
2 data by January.

3 MR. FRAM: Your Honor, may I.

4 THE COURT: Yes.

5 MR. FRAM: The information that counsel refers to,
6 interim earnings, that's information that we've already asked
7 for in written discovery. Just to keep this process moving,
8 you may recall from the last hearing we sent them basic set of
9 interrogatories and a basic document request. We would have
10 that type of area information for the class members for whom
11 we seek damages so we are hopeful -- we anticipate they are in
12 the process of gathering that now. And we anticipate that --

13 THE COURT: I don't get that. I don't think that's
14 the case.

15 MR. FRAM: Well, then we're going to --

16 MR. PRESS: Judge, we just got the class list last
17 week from the defendant. We could not have done it,
18 physically could not.

19 THE COURT: Am I correct. They haven't done it.

20 MR. FRAM: I don't understand what counsel just said
21 about just getting the class list. They had the list of
22 pilots as of April of 2001 for years and years. I don't
23 understand that comment at all, but there is basic information
24 that we need. And I'm very, I guess, troubled is my word
25 about the prospect that we're not going to see that until

1 January. That really slows this process down. Perhaps,
2 counsel could tell us what they are doing in the interim to
3 try to gather that information. I can't imagine why it would
4 be taking another seven months. I'm sorry, another
5 five months.

6 THE COURT: And the slowness really bothers me. I
7 don't disagree with you.

8 MS. RODRIGUEZ: Judge, with regard to the class list,
9 to any answer any questions you may have. When we had the
10 class certify and send out notice when the case got remanded
11 to your Honor, one of defendant's motion they were adamant
12 about was the class not be given access to the class list,
13 that it stay with the claims administrator. That any
14 identifying with the class members or giving the list, only go
15 to that. And it was issue that your Honor ruled on it, and we
16 didn't push on it. That's why when discovery started again,
17 it was important for us. And we asked for the class list in
18 December. We got it a couple weeks ago. But notwithstanding
19 that, if this going to be done correctly, it should be done
20 more systematically than just randomly -- two things. Mr.
21 Press is correct. That it's only going to -- the W2
22 information or the tax --

23 THE COURT: It will be the middle group. It won't be
24 the top group or won't be the bottom group.

25 MS. RODRIGUEZ: It will be a subset of the group.

1 And until we get the list, we don't know who that list is,
2 number one. And, number two, it should be a court approved
3 class notice that goes out to those class members so that
4 there is a process that can be challenged if need be going
5 forward if there is a problem with it instead of randomly
6 saying, you know, here's my letter, give me your tax returns.
7 And then having an issue down the line when there hasn't been
8 a process, because your Honor is the fiduciary for these class
9 members. We are as well, but it should be in a class notice.
10 That's why the schedule that we anticipated would have our
11 expert reports in January 30th. Right after the expert
12 reports, or in, I guess, doesn't need to even wait for the
13 expert reports, but a motion for protective order because much
14 of what defendants sought in their discovery included things
15 like job applications. And I think that's more far afield
16 than they're entitled to even in a mitigation phase.

17 So there has got to be a culling so that the class
18 isn't -- we're not picking up the phone and saying, okay, now
19 we need this, now we need that. So the motion for protective
20 order has to be somewhere in this process.

21 As I said, that doesn't necessarily need to wait until
22 the expert reports are produced at the end of September, but a
23 motion for protective order, and we'll get some rulings on
24 exactly what they're entitled to. And then a real class
25 notice that goes out to those people once the expert report is

1 produced. And I guess the class notice could be -- we can
2 file a motion for a class notice at the same time that we file
3 a motion for protective order -- for approval of a class
4 notice at the same time we file a motion for a protective
5 order.

6 THE COURT: Your view is that the "but for" list, if
7 that's what you want to call it, is going to be ready
8 September 30?

9 MS. RODRIGUEZ: Yes.

10 THE COURT: And the report that shows what
11 methodology was used.

12 MS. RODRIGUEZ: Yes.

13 THE COURT: To create that list.

14 MS. RODRIGUEZ: Yes.

15 THE COURT: What do you see happening after that?

16 MS. RODRIGUEZ: After that --

17 THE COURT: Take depositions, going to be
18 depositions.

19 MS. RODRIGUEZ: I would imagine.

20 THE COURT: You don't really need the calculations of
21 the offsets for the experts.

22 MS. RODRIGUEZ: For the depositions, I don't believe
23 so. So then the defendants can have our experts' depositions
24 and identify their experts.

25 THE COURT: Then what happens?

1 MS. RODRIGUEZ: Then, well, we had proposed that the
2 defendants would disclose their expert reports by
3 November 30th; supplemental reports for -- based on the
4 interim earnings, be produced by January 15th; Daubert motions
5 by February 15th; and then joint final pretrial order at your
6 Honor's discretion.

7 MR. FRAM: If I may --

8 MS. RODRIGUEZ: The Daubert motions could be moved
9 up, but in the interim, supplemental reports of January 15th.
10 The Daubert motions could be on the heels of that. Doesn't
11 have to be a whole month later.

12 MR. FRAM: The names of the TWA pilots were class
13 members, that was an exhibit at trial. I think what counsel
14 is indicating that they may have not have had the addresses
15 for those people. My understanding is that that information
16 is available through American. As your Honor recalls, these
17 former TWA pilots became American pilots. So American is
18 going to have --

19 THE COURT: Some of them became American.

20 MR. FRAM: Some of them. But American is going to
21 have more up-to-date information in many cases, perhaps not
22 all than ALPA. But as far as the identity of the people that
23 have known that, I understand there is an issue about
24 contacting them. What I'm still hearing, your Honor, is that
25 we're going to get a "but for" list by the end of September

1 but there won't be numbers. We're not going to get the
2 numbers in the damage claim with respect to the pilots they
3 claim were injured. I think --

4 THE COURT: Well, you'll get the gross number without
5 offsets.

6 MS. RODRIGUEZ: Yes. There'll be an aggregate
7 number.

8 MR. FRAM: But are we going to get that aggregate
9 number in --

10 THE COURT: How can you get an aggregate number
11 unless you know what the offset was.

12 MR. PRESS: We'll have "what if" earnings tied to
13 that "what if" seniority list. We will not have the --

14 THE COURT: You'll have the offset for what they
15 actually earned during that period doing whatever they were
16 doing even if they were artists or whatever they choose to do.

17 MR. FRAM: Or investment bankers --

18 THE COURT: That's what I mean, investment bankers,
19 pilots.

20 MR. FRAM: So, your Honor, those are not damage
21 figures. That's not a damage number that's admissible or that
22 they can rely upon. So we are talking about a two-stage
23 process. Where we're not going to get their true expert
24 reports and numbers until some point later.

25 THE COURT: Yeah, but if they're true expert reports

1 in a sense that once you determine their view of where the
2 integration should have taken place or how it should have
3 taken place had there been no breach of the duty of fair
4 representation and their methodology for getting there, the
5 question of what the offsets are for actual earnings during
6 this period -- not saying mitigation, just actual earnings
7 during that period, it's just mathematical calculation. I
8 mean, it's not --

9 MR. FRAM: It's not, your Honor. I'll tell you why.

10 THE COURT: Please tell me why.

11 MR. FRAM: Suppose the argument is that a pilot who
12 was furloughed, say, the pilot was Number 1500. That pilot
13 really should have been Number 1300. Number 1300 was also
14 furloughed. It's not going to be meaningful to say that 1500
15 would have moved up to 1300 done better. He might have done
16 better being furloughed at an earlier point than the pilot
17 1,300 who was furloughed later.

18 There is a lot of complexity here, your Honor. And the
19 idea that by creating "but for" list that you can even get
20 close to what the potential damages are, what the claims
21 damages are, in our view, is wrong. And I'll tell you we
22 spent a lot of time --

23 THE COURT: But that may be an attack on their expert
24 report but --

25 MR. FRAM: Your Honor, if they need the time that's

1 fine, I just want to be clear we're not going to be in a
2 position to submit our own expert reports to literally critic
3 theirs until we have the final analysis. The "but for"
4 analysis that will give us the ability to depose those experts
5 and probably will need to take some fact discovery at that
6 point. But we're not going to get the actual numbers until
7 later, so I hope counsel is not suggesting that we're going to
8 have to prepare and submit our expert reports on a number of
9 issues within 30 days after getting their actual number which
10 I think they proposed was January 15th. We're going to see
11 those numbers, that is going to include all the interim
12 earnings and alike, for the first time on the 15th of January
13 under that schedule. We do have an issue with mitigation. I
14 think based upon the discussion that were filed, and counsel
15 will consent a formal motion to raise failure to mitigate.
16 They put it out that we filed our answer six or seven years
17 ago, and we didn't raise mitigation as an affirmative defense.

18 THE COURT: You did.

19 MR. FRAM: We did not. At that point in time, we
20 were focusing on liability issues, your Honor. And we weren't
21 permitted to take discovery with respect to damage issues.
22 And we haven't been to date. So --

23 THE COURT: Well, you certainly weren't blocked
24 raising mitigation in your original answer?

25 MR. FRAM: Your Honor, we weren't, but it would have

1 been meaningless, because many of the facts that we believe
2 exist that would have supported mitigation, didn't even exist.
3 We'll make the motion --

4 THE COURT: Yeah, but mitigation is a fairly obvious
5 thing that becomes an issue. You couldn't modify it in any
6 way but --

7 MR. FRAM: Your Honor, given how obvious it was,
8 we're surprised to hear a suggestion from the other side that
9 they may object to our raising it.

10 THE COURT: That's a clever way of turning it around.
11 I like it.

12 MR. FRAM: Thank you, your Honor. I have to order
13 the transcript now. In any event, we're fine with part of
14 their schedule, but we're going to need the ability to take
15 back discovery. We'd like to start with their experts'
16 depositions after we get the "but for" report and take some
17 fact discovery; and then I think the way to do this, your
18 Honor, is after we get their report that has numbers,
19 including the interim numbers, is to have a management
20 conference. At that point we should be in a position to
21 advise the Court and plaintiff's counsel what we agree or
22 disagree with and talk to the Court about how much time we
23 think we need.

24 We are prepared to go ahead, as I say, in the interim
25 with certain fact discovery that we think is helpful. We do

1 want counsel to respond to the extent they can to some of the
2 written discovery. We do have the named class
3 representatives, your Honor. I think we'd like the
4 opportunity to take their depositions as we typically do in a
5 class case.

6 With respect to damages, I think we can wait until
7 after September 30th to do that. There are depositions that
8 we think we need to be taken.

9 THE COURT: What discovery do you want from the class
10 reps?

11 MR. FRAM: We think there probably is case studies in
12 terms of what they were able to do or not do in terms of
13 interim earnings or mitigation and alike. So we think they're
14 parties --

15 THE COURT: You think you have to wait until you get
16 their expert's report?

17 MR. FRAM: We can probably do it before, if there is
18 no objection to that or if the Court thinks it's helpful. I
19 don't have a problem with that.

20 So, we can certainly schedule that later this month or
21 in September. But there are depositions, your Honor of the
22 American pilots, the APA witnesses that we think are going to
23 be necessary. There is discovery from American Airlines some
24 of which you're getting. So, there is a lot that can be done,
25 your Honor, between now and January. We're willing to go

1 ahead and do it, but we just want to be clear that until we
2 see the bottom line --

3 THE COURT: What do you think that can be done
4 between now and September 30th?

5 MR. FRAM: We could probably take the depositions of
6 the day class rep. We can probably start to take some of the
7 depositions of the American and APA witnesses. We may be able
8 to do that.

9 Paper issues are important. We'd like to get answers
10 to the extent there is -- they can be provided to our written
11 discovery. But we're happy to work with -- sit with counsel
12 and try to work out a schedule.

13 Your Honor, one of the odd things about this case, and
14 this is an artifact of bifurcation, of course, is that we
15 haven't really gotten into any damages of discovery at all.
16 We don't have Rule 26 disclosures from the plaintiffs. We're
17 not preparing that to a typical joint discovery plan in this
18 district. We're doing this a little bit on the fly. So we
19 would like to think about what we can do between now and
20 September 30th. But certainly the depositions, your Honor, of
21 the class reps and their documents that relate to these
22 issues, because even though what happened to them, or didn't
23 happen to them, may not be representative of whether or not --
24 THE COURT: Slow down. You think you can do the
25 class rep deps before September 30th.

1 MR. FRAM: Yes, Your Honor.

2 THE COURT: What else do you think, specifically?

3 MR. FRAM: Some depositions, your Honor, of American
4 witnesses and Allied Pilots witnesses.

5 THE COURT: How many are you talking about?

6 MR. FRAM: I'm thinking somewhere in the range of
7 five to 10 would be feasible.

8 THE COURT: What else? Anything else you think be
9 done in that period? Paper discovery of any kind?

10 MR. FRAM: I think we can do some paper discovery.

11 THE COURT: Which is?

12 MR. FRAM: Production of documents to the extent it's
13 available.

14 THE COURT: What kind of documents?

15 MR. FRAM: Tax returns, W2s.

16 THE COURT: On who?

17 MR. FRAM: With respect to certainly the named class
18 reps. And then any other pilots whom the plaintiffs can
19 provide.

20 As your Honor may recall, we have at this point, I
21 think it's five named class reps, but we have many other
22 pilots some of who testified at trial who have been active in
23 the case. And we are assuming certainly there is a summary of
24 pilots for whom the plaintiffs had been in regular
25 communication and for whom they can get that type of

1 documentation. So, to the extent -- unless they're willing to
2 set aside some of those pilots and stipulate that they have no
3 damaged claims, then we think it would be helpful to get that
4 discovery as well. And having that information, again, your
5 Honor, would be helpful to us in projecting forward in terms
6 of what else we need and how we can start to prepare our case.

7 I think Mr. Katz has a question.

8 MR. KATZ: Yes, your Honor, in terms of clarifying
9 Mr. Fram's comments, I have a question I'd like to ask
10 opposing counsel through the Court, one or two questions.

11 THE COURT: Go ahead.

12 MR. KATZ: First, they have provided us a designation
13 of two experts. I just want to establish a true or false, are
14 we going to get the reports from both of these people by
15 September 30th or just one?

16 MR. PRESS: You'll get whatever reports either one of
17 those gentleman prepare by September 30th.

18 THE COURT: Well, that's no answer at all.

19 MR. PRESS: I don't know if he's trying to get me to
20 commit on who the expert is.

21 THE COURT: That's not an answer.

22 MR. PRESS: No. No. If we intend to call --

23 THE COURT: Whatever you have, you'll give him which
24 might include nothing.

25 MR. PRESS: If we intend to call either one of them,

1 we will have a report provided to the defendant by that date.

2 MR. KATZ: And if they don't provide a report by that
3 date, then they won't call that person.

4 THE COURT: Is that what you're saying?

5 MS. RODRIGUEZ: Yes.

6 MR. PRESS: Yes.

7 MR. KATZ: As a follow-up to that, we heard a
8 description from counsel for the plaintiffs of what this "but
9 for" list is going to be. And my question is, when we get
10 this list, is it going to show the projected earnings for each
11 pilot by name, or is it just going to be a gross number for
12 the entire group for whom they are claiming damages?

13 MR. PRESS: Our intent is to do that by name.

14 MR. KATZ: So we would get individual amounts that
15 the pilot should have earned.

16 THE COURT: You can put, you can say -- Mr. Press,
17 you can say, all right, this pilot had they not been the
18 breach, this is the order, you know, this TWA, Joe Smith, TWA
19 pilot, would have been 1112. Joe Jones would have been, you
20 know, 1100 something. But that doesn't necessarily -- that
21 doesn't say what the earnings would have been.

22 MR. KATZ: No, Your Honor. That's my question to Mr.
23 Press.

24 THE COURT: You follow me? The fact that somebody
25 who wound up, let's assume, it's 1400 on the list would now

1 been 1100 on the list --

2 MR. PRESS: We would assign each class member damages
3 based upon the American pilot in his or her position actually
4 earned. That's what we would intend to do.

5 THE COURT: So, you would account, for instance,
6 let's assume somebody should have been 1100, who turns out was
7 1500, then you now determine they would have been 1100, you
8 just look at what the American pilot 1100 actually earned.

9 MR. PRESS: True. Precisely.

10 THE COURT: Assuming he was furloughed. Whatever he
11 wound up earning that would be assigned to the panel Joe Jones
12 from TWA who is moved from 1400 to 1100.

13 MR. KATZ: And we're going to learn that on
14 September 30th.

15 MS. RODRIGUEZ: Your Honor, that's basically --

16 MR. PRESS: There may be a deduct.

17 THE COURT: I understand there is inherently a deduct
18 for what that pilot actually earned during that period, even
19 for non flying. I mean, earned as a bartender or whatever he
20 or she earned. I understand that. And I think I understand
21 that you don't plan to have that by September 30th.

22 MS. RODRIGUEZ: And it may not be quite as -- there
23 may be some regression analysis done within that -- within
24 that category, like Pilot Number 17 may now be Pilot Number 2
25 and it may not -- our expert is still working on it.

1 I don't want to come in here two months from now and
2 say, They sat here and told us A, B, and C. It's in the
3 process of being done, and there are some components of --

4 THE COURT: Well, boy, you better figure out what it
5 is you're conceptually going to show.

6 MS. RODRIGUEZ: Our expert can tell you what they're
7 going to show, your Honor, but --

8 THE COURT: You had this case and you had this theory
9 of liability for a long time now.

10 MS. RODRIGUEZ: We're going to have the numbers in
11 January. I mean, in September.

12 THE COURT: I'm not saying now if the numbers aren't
13 there, I'm going to strike the whole thing. But I want to --
14 I got to move the case. You have to come up with a theory of
15 liability. And you, at the very least, have to show, very
16 least, where you say the integration, how it would have taken
17 place, the "but for," if you will, list. You have to show the
18 pilot who is 1412 should now have been 1127. Instead of 800
19 should have been 600. You got to, at the very least, do that.

20 MR. PRESS: We will. We can and we will. And Judge
21 we will take every effort to expedite this, believe me.

22 MR. FRAM: Your Honor, in terms of the schedule, can
23 we proceed with the discovery on the --

24 THE COURT: What I'd like to do -- I think the more I
25 bite off, the more I'm going to wind up in revising it three

1 days later or whatever.

2 I want to set the date for their report. Your singular
3 or plural, report or reports, on the 30th. But, again, from
4 Mr. Katz's point, if you don't intend to use the person, I
5 don't care if you get the report, but anybody you intend to
6 use as an expert, that their report should be September 30th.
7 And it should, at the very least, be a "but for" report
8 meaning this is where they would have been had the two things
9 been stapled, absent, but for, a breach of the duty of fair
10 representation. And without regard to offset by actual
11 earnings shows what they would have earned in gross from
12 American had they been in that better number. That at the
13 very least, I think we should have by September 30th.

14 I think that defendant should have the right to depose,
15 let's assume, for no more than four hours, it's five, right.

16 MR. FRAM: I think it's five. It's changed a couple
17 of times.

18 THE COURT: We reduced the number.

19 MR. FRAM: We did, your Honor.

20 THE COURT: Whatever the number is.

21 MR. PRESS: It's five. What can they conceivably
22 talk about for four hours at this point in the case?

23 THE COURT: Well, I didn't say it had to be four
24 hours long. I just -- I don't want to cut off arbitrarily,
25 look, anybody feels being oppressive, call me up right then

1 and there from wherever you are, where you're taking them.

2 And then I think you should have the right -- if you're going
3 to want to take five of their people -- or they want to take,
4 I don't know, do you want to take any of their people?

5 MR. PRESS: Sitting here today, we don't have anybody
6 in mind to depose about.

7 THE COURT: Would you like to take five of American
8 or APA people?

9 MR. FRAM: Both.

10 THE COURT: Either American or APA? That's
11 different. APA is not in bankruptcy, American is.

12 MR. FRAM: We would subpoena the individuals. I
13 don't think the --

14 THE COURT: They will all be subpoenas, none of them
15 are your clients?

16 MR. FRAM: Yes, exactly.

17 MR. PRESS: Judge, can you -- or maybe they will
18 agree to disclose who these third-party witnesses are, because
19 I don't know who they are.

20 MR. FRAM: We will. We will obviously serve
21 deposition notices and give counsel notice.

22 THE COURT: It may wind up being more than five some
23 day, I just wanted to get something started that's reasonable
24 to do.

25 MR. FRAM: So we can take the depositions of five

1 and/or American and APA witnesses?

2 THE COURT: Right.

3 MR. FRAM: We'll coordinate with counsel.

4 THE COURT: Coordinate the dates.

5 MR. FRAM: Of course, your Honor.

6 THE COURT: Ten witnesses, at four hours, I don't
7 think it will take four hours, but even if it did took to the
8 second, it's four weeks.

9 MR. FRAM: The APA and American witnesses may be
10 longer than four hours. I was assuming we --

11 THE COURT: Why is that?

12 MR. FRAM: Remember, Jeff Brundage, your Honor, we
13 need some time I think to get him to address a number of
14 topics --

15 THE COURT: You mean because he's evasive.

16 MR. FRAM: No, because he knows a lot of the
17 importance of the case. So our assumption is --

18 THE COURT: Still going to limit it to four hours.
19 If somebody wants to make an application after four hours to
20 extend it, call me on the telephone.

21 MR. FRAM: For planning purposes that may be a little
22 difficult, your Honor. Are you comfortable with letting us go
23 with just the one day for seven hours.

24 THE COURT: Just for Brundage?

25 MR. FRAM: Just for American and the APA witnesses.

1 THE COURT: No, I'm sticking to four hours.

2 MR. FRAM: All right.

3 THE COURT: I think you can get a lot of information
4 from somebody in four hours with proper questioning. But if
5 you come up towards the end and it looks like you need more,
6 just let me know what day you're going to be so I can make
7 myself available and tell me how to reach me for extending it.

8 MR. FRAM: Thank you, your Honor.

9 THE COURT: So, that's all I'm going to try to
10 accomplish by September 30th.

11 MR. FRAM: How about documents with respect to the
12 class reps we're going to depose. We are focused on damages.
13 We did ask for interim earning, other information about them.

14 THE COURT: Unless you let me know, what is that you
15 want?

16 MR. FRAM: We want to know what they were doing
17 during any period they were furloughed. And if they were not
18 working, what they were doing to try to find work. I have a
19 document request. I don't know that you want me to give it
20 up.

21 THE COURT: Not for every pilot in the American
22 group?

23 MR. FRAM: No, starting at this point, just for the
24 five depositions we are going to take for four hours or less,
25 four hours or less. Just focusing on the names and class

1 reps, your Honor.

2 MR. PRESS: That deposition should take 30 minutes,
3 Judge.

4 THE COURT: First of all, I don't think -- that
5 information, that can be provided without a doubt.

6 MR. PRESS: Interrogatories.

7 MR. FRAM: Once we get the written information, it
8 may even take a shorter deposition.

9 THE COURT: You're basically saying you want the
10 actual work history of the five class reps?

11 MR. FRAM: Exactly.

12 THE COURT: I don't know what exact dates are, but
13 from predetermined dates. And I have no objection to that.

14 MR. FRAM: Precisely. It may be, your Honor, if we
15 get that, we don't even need depositions. But if we do,
16 there'll be limited as your Honor has directed to four hours.

17 THE COURT: Yeah.

18 MR. FRAM: Okay. I think that gives us what we can
19 accomplish to move this ahead by September 30th.

20 THE COURT: I'm trying to see what we can get done by
21 September 30th and then I'll setup a conference the first week
22 of October and go from there.

23 I got to have the -- the fundamental methodology of
24 computing damages, is still a mystery to me.

25 MR. FRAM: Yes.

1 THE COURT: I really mean that. I'm trying to think
2 if I were a lawyer, what would I be thinking. How would I go
3 about doing that. And I can't say that my lights are popping
4 up all over my head, how I would do it. But econometrics I
5 guess is not my field.

6 MR. PRESS: Two points, Judge. As to these
7 third-party witnesses, can you ask, or order, the defendants
8 to supplement their Rule 26 disclosures. I just don't want to
9 be surprised with a new witness that wasn't deposed in the
10 next 60 days down the road. They should amend Rule 26.

11 THE COURT: Rule 26 disclosures generally involve a
12 case, not a person. You're talking about making a Rule 26
13 voluntary disclosures which should have been made ten years
14 ago or something like that.

15 MR. PRESS: There is a provision in Rule 26(a) for
16 disclosure of witnesses, Judge. And that's what we would ask
17 to be amended.

18 MR. FRAM: Your Honor, we'll supplement it. We'll
19 give them notice of who we have in mind and what we think
20 those people will say, your Honor, no problem.

21 MR. PRESS: The other issue, September 30th is a
22 Sunday. Can we make it October 1st or September 28th?

23 THE COURT: September 28th.

24 MR. PRESS: There we go.

25 THE COURT: Friday. Make it that Friday. Okay.

1 Let's just review the date here, because we're going to ask
2 somebody to prepare -- we are going to get one or two,
3 whatever experts going to be used, get their reports which,
4 again, I expect to set forth the basic methodology, even if we
5 don't have all the numbers and certain rule on mitigation, we
6 won't even have proper offset at that point, but that
7 shouldn't stop having a basic philosophy, I don't know if
8 that's the right word, of how we're going to decide, how the
9 list would have been integrated, the lists would have
10 integrated, if there had not been a breach of duty of fair
11 representation. So we'll get that. We'll get a complete five
12 depositions of each of the class reps. We'll also have
13 produced, at least, the work history of those five reps during
14 the period when the integration took place, actually, took
15 place and today, right? Then we'll have the reverse of that.
16 He will be allowed -- not the reverse. He'll be allowed to
17 take five American slash APA witnesses. And he will provide
18 you with, in effect, Rule 26 type disclosures, 26(a) type
19 disclosure, respecting those five witnesses, four-hour limit.
20 Okay. I think that covers everything.

21 MR. FRAM: Then a conference date in early October.

22 THE COURT: We'll give it to you -- what I'm going to
23 ask, I'll ask Mr. Fram to draw the order, draw a draft order.
24 Before I ever get it. I don't want to see it until you
25 reviewed it with Mr. Press or Ms. Rodriguez and then give it

1 to me. But we'll call you, Mr. Fram, and give you the date,
2 the first week in October.

3 MR. FRAM: Thank you, your Honor.

4 THE COURT: We'll have a conference. Sitting here
5 now I just don't know. We'll know in a day or two. Probably
6 know today. Mr. MacStravic will call you and let you know.
7 You're willing to take the burden of doing this order.

8 MR. FRAM: Yes, of course, your Honor. We'll work it
9 out.

10 THE COURT: But I want to make sure -- I don't want
11 to see even a draft of it until you passed it by and worked
12 with -- however, you go, between Ms. Rodriguez, Mr. Press, Mr.
13 Jacobson, however you work it out.

14 See, I mentioned your name Mr. Jacobson.

15 MR. JACOBSON: I appreciate it, your Honor.

16 THE COURT: And, Mr. Jacobson, you can't see the
17 courtroom, but do you know that my head is rotating back and
18 forth, I spent 30 seconds looking at the defendant, and I
19 spent 30 seconds looking at the plaintiff, then turned back
20 and spent 30 seconds looking at the defendant. I go back and
21 forth regardless of who is winning and regardless of what I'm
22 saying.

23 You heard that?

24 MR. JACOBSON: I heard it.

25 THE COURT: Okay. And then we'll go to the next step

1 after that. I think when we get that, somehow or other, we
2 will be in a little better position to be able to layout (a)
3 complete discovery, may not be that more, but if more is
4 necessary, and also a trial. It's a little different
5 necessarily than discovery plan. (A), how the case will be
6 discovered, how do we try it? Because that still intrigues
7 me, the fact that it's a jury case. Nonjury I can do all
8 kinds of things. We had a case here involving a prison riot
9 where the police came in and allegedly beat up seven of the
10 prisoners. Wound up they agreed to be nonjury. And we had
11 Judge Bissell, former Judge Bissell, coming every week for a
12 year and a half, trying mini cases. There had been a quote,
13 settlement, if you will, but basically wound up trying
14 probably 50 or 60 or 80 cases, maybe even more, little tiny
15 cases, right down the hall in Judge Rodriguez's old courtroom,
16 back there.

17 So how the case is going to be tried. Anything else by
18 either party?

19 MR. FRAM: Nothing further. Thank you, your Honor.

20 MR. PRESS: No, Your Honor.

21 MS. RODRIGUEZ: No, Your Honor.

22 THE COURT: And the disembodied voice in the sky,
23 have anything to say to me?

24 MR. JACOBSON: No, Your Honor. I heard you perfectly
25 throughout. Sometimes had to strain to hear the lawyers, but

1 I got all I need to know.

2 THE COURT: All right. Have a good afternoon,
3 everybody. We'll see you, I don't know, October 2nd or 3rd,
4 something like that.

5 MR. FRAM: Thank you, your Honor.

6 THE DEPUTY COURT CLERK: All rise.

7 (Proceeding is concluded for the day.)

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